

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E.I. du PONT de NEMOURS &	)	
COMPANY,	)	C.A. No. 99C-12-253 (JTV)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STONEWALL INSURANCE	)	
COMPANY, et al.,	)	
	)	
Defendants.	)	

*Submitted: January 12, 2009*

*Decided: January 12, 2009*

*Opinion Issued: June 30, 2009*

John E. James, Esq., and Richard L. Horwitz, Esq., Potter, Anderson & Corroon,  
Wilmington, Delaware for Plaintiff.

Brian L. Kasprzak, Esq., Marks, O'Neill, O'Brien & Courtney, P.C., Wilmington,  
Delaware for Defendant Stonewall Insurance Company.

*Upon Consideration of Plaintiff's  
Motion For Summary Judgment on  
The Number of Occurrences*

**GRANTED**

**VAUGHN, President Judge**

## **OPINION**

The motion I address in this opinion was filed by the plaintiff, E.I. duPont de Nemours & Company, as a Motion For Entry of Judgment as a Matter of Law under Superior Court Civil Rule 50(a)(2). It was originally contemplated that the motion would be addressed at a trial of the case which commenced in September 2008. The trial resulted in a mistrial, however, and the motion was subsequently converted to a Motion For Summary Judgment under Superior Court Civil Rule 56.

The issue is whether certain liabilities sustained by the plaintiff arise from a single occurrence, as it contends, or whether they arise from more than one occurrence, as defendant Stonewall Insurance Company contends.

## **FACTS**

The facts are fully set forth in prior opinions which have been issued in this case. They are repeated here and expanded where pertinent to address the number of occurrences issue.

In 1983, DuPont began manufacturing and selling an acetal resin plastic material known as “Delrin.” The material was purchased and used by other companies to mold fittings for polybutylene plumbing (PB) systems, which were installed in residential housing units. The original manufacturer of acetal plastic material was Hoechst-Celanese Corporation, which called its product “Celcon.” Between 1978 and 1983, Hoechst-Celanese supplied all of the acetal plastic material for the manufacture of fittings for PB systems. In 1983, DuPont entered the market with its product, Delrin. Beginning in that year, both DuPont and Celanese sold acetal plastic material to the fitting manufacturers, and both DuPont’s Delrin and

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Celanese's Celcon were used to make fittings that were incorporated into PB systems installed across the country. DuPont manufactured and sold Delrin until 1989. In all, it is estimated that beginning in 1978 and continuing until 1989, PB systems with acetal fittings were installed in millions of homes across the United States and Canada.

In 1987, DuPont received service of its first lawsuit filed on behalf of homeowners seeking damages on account of property damage allegedly caused by defective PB systems. The lawsuit alleged that DuPont, along with Hoechst-Celanese and other entities, was liable for damages because PB systems, including their acetal fittings, were inherently defective and caused property damage and loss of use of property. As a result of this lawsuit and others, DuPont stopped selling Delrin to manufacturers of PB system fittings.

In the ensuing years, DuPont was faced with many lawsuits filed on behalf of homeowners with PB systems. The suits sought compensation for the cost of repair and replacement of PB systems, the cost of repairing water damage to homes caused by leaks in PB systems, and damages for other problems which the homeowners allegedly experienced as a result of the failure of the PB systems.

Between 1989 and November 2007, DuPont incurred over \$239 million in total PB liabilities from the thousands of claims filed. Systems giving rise to these claims were installed in each year from 1983 when Delrin went on the market until 1989 when DuPont discontinued its sale.

From March 1, 1967 until today, DuPont has maintained a comprehensive general liability ("CGL") insurance program. For each policy year, there is a per-

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occurrence self-insured retention (“SIR”) amount and then multiple layers of excess liability insurance providing coverage above the SIR. In many cases, each layer of excess coverage in a given policy year is subscribed to by multiple insurance companies. For example, in the March 1, 1983 to March 1, 1984 policy year, there is a \$50 million SIR, followed by four layers of excess insurance totaling \$145 million of coverage. Each layer of excess coverage is subscribed to by multiple insurers.

The two policies issued by Stonewall were both issued in 1985. One policy participates in the first layer of excess insurance above the \$50 million SIR. The limit of that layer is \$5 million. Stonewall provides \$1 million in coverage for that first layer. The other Stonewall policy participates in the next layer up, which has a limit of \$15 million. Stonewall provides \$4 million in coverage for that second layer.

Beginning March 1, 1986 and for the relevant period thereafter, DuPont obtained most of its liability insurance from its Bermuda-based captive insurers, Danube Insurance Ltd. and Wabash Insurance Ltd., which in turn were 100% reinsured by Bermuda-based insurers, including X.L. Insurance Company and A.C.E. Insurance Company.

DuPont has entered into settlements with its post-March 1, 1986 insurers, and they have not been parties to this action. The litigation has focused primarily on the 1983, 1984, and 1985 insurers. All of the insurance companies which issued policies to DuPont for the policy years 1983, 1984, and 1985 were initially defendants in the case, but all have settled except Stonewall.

A defense expert has given an opinion that there were two different,

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independent defects in the plumbing fittings attributable to Delrin. One was that elements found in typical household water, such as chlorine, unfavorable pH, and soluble metals, degraded the fittings, causing them to leak. This is the so-called “inside-out” chemical degradation problem. The other is that Delrin lacks the strength to resist mechanical stresses on the fittings, causing them to crack and leak. This is the so-called “outside-in” crack problem. For purposes of this motion, I accept this opinion as fact.

The relevant definition of “occurrence” in the Stonewall policies is as follows:

The term “Occurrence” wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. All Personal Injury or Property Damage arising out of a common condition in goods or products manufactured, sold, handled or distributed by the Named Insured shall be deemed one occurrence.

### **PARTIES’ CONTENTIONS**

DuPont contends that its Delrin liabilities arise from a single occurrence – Delrin’s lack of suitability for use in PB plumbing systems. I have concluded that summary judgment should be granted to DuPont on the basis of this contention. Before turning to that discussion, however, I will briefly comment on DuPont’s other contentions.

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DuPont contends that the above-quoted policy language must be construed in its favor as a matter of law because the insurance industry drafted the policy language and DuPont has offered a reasonable interpretation of “occurrence.” As to this contention, I am not persuaded that the language in question is ambiguous or that the motion should be decided upon this point. DuPont’s next contention is that all of DuPont’s Delrin liabilities arise from a single occurrence because they all emanate from a single manufacturing plant in West Virginia where Delrin was manufactured. This contention is based upon the second sentence of the definition of “occurrence.” DuPont offers no case authority which has relied upon that sentence in a products liability setting, and I am not persuaded that the second sentence necessarily should be applied to the facts of this case in the manner which DuPont advocates.

DuPont’s next contention is that if “inside-out” chemical degradation and “outside-in” mechanical stress cracks are two separate occurrences, it should still receive summary judgment because all of the amounts paid out by DuPont were for “inside-out” degradations. This contention is actually a rebuttal to Stonewall’s contention that “inside-out” damage and “outside-in” damage are two separate occurrences. This contention on the part of DuPont, however, seems to raise issues of absence of evidence versus presence of evidence and burden of proof. It relies in part upon a December 2, 2008 affidavit of Mr. Hines, in which he states, in part, that of the \$161 million in Delrin claim-specific costs that DuPont has incurred, none have been on account of “outside-in” cracks. While this may be quite correct, Mr. Hines has not been subjected to cross-examination on the affidavit, and I am reluctant to grant summary judgment on the basis of this DuPont contention.

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Stonewall offers four contentions in opposition to the motion. The first is that DuPont's original motion for judgment as a matter of law is procedurally deficient because the mistrial order rendered the trial proceedings a nullity. In my opinion, converting the motion to one for summary judgment disposed of this contention. The second is that DuPont's motion lacks merit because it is merely a recycled version of arguments which DuPont made in 2004 when a DuPont Motion For Summary Judgment on the number of occurrences was denied. In an opinion issued on August 31, 2004, I ruled that the number of occurrences presented issues of fact which could not be decided on summary judgment. However, I am satisfied that the record has been more fully developed and/or more clearly presented to the Court now and that the matter can now be decided on summary judgment.

Stonewall's third contention is, one might say, the opposite of DuPont's West Virginia-manufacturing plant contention. Stonewall contends that the damage at each individual household is its own separate occurrence. Under this theory, there are approximately 469,000 occurrences. Stonewall's fourth contention is that the "inside-out" chemical degradation and the "outside-in" mechanical stress failure are two separate occurrences. These last two contentions are addressed in the following discussion.

### **STANDARD OF REVIEW**

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>1</sup> The

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<sup>1</sup> Super. Ct. Civ. R. 56(c).

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moving party initially bears the burden of showing that no material issues of fact are present.<sup>2</sup> If a motion is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.<sup>3</sup> In considering the motion, the court must view the evidence in the light most favorable to the non-moving party.<sup>4</sup> Summary judgment is inappropriate “when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.”<sup>5</sup>

### **DISCUSSION**

Delaware courts have adopted the “cause” test for determining the number of occurrences in liability insurance coverage cases, in accordance with the majority view. While a minority of courts have applied different tests focusing on the effects of an injurious condition, rather than the original cause,<sup>6</sup> most courts and

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<sup>2</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>3</sup> *Id.* at 681.

<sup>4</sup> *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

<sup>5</sup> *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at \*1 (Del. Super. Jan 31, 2007).

<sup>6</sup> Some courts applying New York law have adopted a variant of the cause test known as the “unfortunate events” test. Eugene R. Anderson, Jordan S. Stanzler, Lorelie S. Masters, *Insurance Coverage Litigation* § 9.05 (2d ed. 2009). Other courts have followed the English Rule, which “views an accident or occurrence from the perspective of the injured party, not from the perspective of the policyholder.” *Id.* at § 9.06. For cases rejecting a pure causal analysis, see *In re Prudential Lines Inc.*, 158 F.3d 65 (2d Cir. 1998) (holding that each claimant’s injuries due to presence of asbestos on insured’s ship arose from a separate occurrence); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995) (reasoning that relevant “accident” was not insured’s decision to manufacture asbestos, but that each installation of asbestos-

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commentators continue to support the cause test.<sup>7</sup> A causal analysis has been used

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containing materials gave rise to a separate occurrence); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891 (Conn. 2001) (holding that claimants' initial exposure to asbestos, rather than health insurer's failure to warn of risks, produced multiple occurrences that could not be aggregated to reach the per occurrence threshold for coverage); *ExxonMobil Corp. v. Certain Underwriters at Lloyd's, London*, 841 N.Y.S.2d 819, 2007 WL 1615102 (N.Y. Sup. Ct. June 5, 2007) (finding that unfortunate event test did not apply to insured's deliberate, purposeful manufacture of two ultimately defective products—polybutylene resin and synthetic aviation lubricant, and each installation constituted a separate occurrence). These cases are in direct conflict with the rule adopted by the Third Circuit, which this Court is bound to follow as precedent.

<sup>7</sup> *Mich. Chem. Corp. v. Am. Home Assurance Co.*, 728 F.2d 374, 379 (6th Cir. 1984) ("The vast majority of courts ... have concluded that although injury must be suffered before an insured can be held liable, the number of occurrences for purposes of applying coverage limitations is determined by referring to the cause or causes of the damage and not to the number of injuries or claims."); *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 823 F. Supp. 975, 983 (D. Mass. 1993) ("I find, consistent with the rule in the majority of states, that the number of occurrences turns on the underlying cause of the property damage ...."); *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1546 (C.D. Cal. 1992) ("A majority of courts determines the number of occurrences based on the underlying cause of the property damage. By contrast, a minority of courts determines the number of occurrences based either on the effect of the accident or the event that triggers liability.") (citations omitted); *Bartholomew v. Ins. Co. of N. Am.*, 502 F. Supp. 246, 251 (D.R.I. 1980) ("To determine whether more than one occurrence took place, the majority of jurisdictions employs the 'cause' theory."); *Transport Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F. Supp. 1325, 1330 (N.D. Tex. 1980) ("The rationale underlying the various decisions which have held that particular events constituted but a single occurrence has been that courts generally look to the cause as opposed to the effect of such events. The great majority of courts have adopted a 'cause' analysis."); *Union Carbide Corp. v. Travelers Indem. Co.*, 399 F. Supp. 12, 16 (W.D. Pa. 1975) ("We believe that the heavier weight of judicial authority strongly tends to the interpretation that in insurance policies which contain a limitation of coverage for each 'accident' the word is intended to denote the cause of the loss rather than the effect."); Anderson, *supra* note 5, at § 9.01[A] ("The vast majority of courts have held that the number of occurrences is decided by looking to the cause or causes of injury."); *id.* at § 9.03[A] (despite criticisms of the cause test, "the policy language and drafting history support this approach, and courts continue to decide that cases involving continuing or progressive injuries involve a single 'proximate cause' of all the injuries, and, thus, one occurrence.").

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in rejecting insurers' arguments that each personal injury or property damage claim constituted a separate occurrence. The analysis has also been applied to reject insurers' theories that multiple technical factors contributing to a product's failure should be considered separate occurrences. Based on relevant Third Circuit precedent and the clear trend in products liability cases, I am satisfied that DuPont's formulation of the cause test as applied to its Delrin liabilities is appropriate to resolve the number-of-occurrences issue in its favor as a matter of law.

\_\_\_\_\_ *E.I. du Pont de Nemours & Co. v. Admiral Insurance Co.*,<sup>8</sup> is the leading Delaware case applying the cause test in the context of a continuous hazardous condition. The case follows the applicable Third Circuit precedents and directly supports DuPont's position that the sale or the unsuitability of Delrin was a single occurrence.

In *Admiral*, the defendant insurers filed a motion for partial summary judgment on the number of occurrences as defined in various policies issued to DuPont. DuPont filed a cross-motion on the same issue. The court's main inquiry was whether the property damage at one of DuPont's plants and at a nearby landfill resulted from a single occurrence or from multiple occurrences.<sup>9</sup>

DuPont argued that because the two sites, known as Necco and Niagara, were

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<sup>8</sup> 1996 WL 190764 (Del. Super. 1996).

<sup>9</sup> Environmental damage occurred at DuPont's Niagara Falls plant and at Necco Park Landfill due to the migration of industrial wastes stored at those sites. The Niagara plant produced the industrial wastes at both sites, and they were then distributed to different areas for disposal.

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separate sites and different contaminants were introduced to the groundwater at each site, the contamination arose from two separate occurrences. The insurers pointed to the Niagara plant as the source of the contaminants, the distribution of which ultimately resulted in the property damage. The relevant policy language stated: “[A]ll personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.”<sup>10</sup>

The court began with the well established rule as set forth by the Third Circuit: “Generally, an occurrence is determined by the cause or causes of the resulting injury.”<sup>11</sup> The court noted that “[t]he commonly accepted test is whether there is one proximate, uninterrupted, and continuing cause which resulted in all of the damage.”<sup>12</sup> In applying a causal analysis, the court continued, “courts have held that ‘where a single event, process or condition results in injuries, it will be deemed a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals.’”<sup>13</sup> The court reasoned that, whether the damage to the sites resulted from the disposal of cyanide residue solids near Building 301 at the plant or of copper sludge at the southern boundary of the plant, or from the burial of any such Niagara plant contaminants at Necco, the creation of the

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<sup>10</sup> *Id.* at \*1.

<sup>11</sup> *Id.* at \*3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citing *Transport Ins. Co.*, 487 F. Supp. at 1330).

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contaminants caused the damage at Niagara and the need for their subsequent disposal.<sup>14</sup> In other words, “the damage-producing contaminants emanated from the plant at Niagara. Consequently, a single plant’s waste creates a single occurrence.”<sup>15</sup> While the facts showed that where the waste was stored and the specifics of the waste’s “damage-causing migration” varied, “the initial cause of the environmental damage at both the Niagara plant and at Necco was the production of industrial waste by the Niagara plant followed by the disposal of that waste at those on- and off-plant locations.”<sup>16</sup>

The court discussed the holding in *Uniroyal, Inc. v. Home Insurance Co.*,<sup>17</sup> a case involving insurance coverage for a manufacturer of Agent Orange, with respect to a proposition significant in its implications for DuPont: “The conclusion is clear in the case of mass disposal of hazardous products ultimately imposing damage at a

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 707 F. Supp. 1368 (E.D.N.Y. 1988). It is significant to note that the *Uniroyal* court, which found one occurrence based on the mass delivery of Agent Orange, construed a “deemer” clause identical to that in the Stonewall policies. *See id.* at 1386:

In addition to the first sentence of the Uniroyal policies’ occurrence clauses defining an occurrence as ‘an accident or a happening or event or a continuous or repeated exposure to conditions,’ the second sentence of the clauses independently establishes that ‘[a]ll such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.’ To the extent that the deliveries of the contaminated herbicides stemmed from a policy adopted at Uniroyal’s headquarters (or another single location), the court may find one occurrence.

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large number of locations. In determining the number of occurrences, the proper focus in a products liability case is on production and dispersal—not on the location of injury or the specific means by which injury occurred.”<sup>18</sup> The court denied both parties’ motions for summary judgment and remanded the case for a determination of whether the damage at Niagara and Necco resulted from “separate, uninterrupted conditions at the landfill clearly distinguishable from the events at the plant which created the environmental wastes in the first instance.”<sup>19</sup>

While the *Admiral* case is factually distinguishable from the case at bar, the principles set forth by the court apply with equal force to DuPont’s Delrin liabilities. The court unequivocally adopted the cause test for determining the number of occurrences, and reinforced the “proximate, uninterrupted, and continuing” language

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<sup>18</sup> *Admiral*, 1996 WL 190764, at \*3.

<sup>19</sup> *Id.* at \*5. Stonewall argues in its opposition brief that DuPont’s motion “ignores the analytical framework for the application of the ‘deemer’ clause in the occurrence definition established by Judge Steele in [*Admiral*].” Stonewall’s Opposition to DuPont’s Motion for Entry of Judgment as a Matter of Law, at 2. Stonewall claims that Vice Chancellor Steele “comprehensively analyzed” the premises location issue. To the contrary, Vice Chancellor Steele denied summary judgment, submitting to the jury the issue of whether there was exposure to the same conditions emanating from one premises location: It was conceivable that certain conditions existed at the landfill which were independent from the events at the plant. In the present case, which involves widespread property damage as opposed to the migration of toxic waste at two discrete sites, the record is developed, and the “single event, process, or condition” is clearly ascertainable. Stonewall fails to identify how DuPont’s Delrin’s liabilities can be likened to the disposal and migration of industrial waste. Stonewall also fails to note that the *Admiral* court effectively conflated “single premises location” with “occurrence,” stating: “[T]he debate between the parties is not over the meaning of a term or terms, but over which location the ‘single premises location’ language applied, *i.e. what was the cause of the damage.*” *Id.* at \*4 (emphasis added).

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that appears throughout the relevant case law. The court, thus, looked to the *source* of the ultimately damaging condition, or the place of its creation. While the court was unwilling to grant summary judgment pending a more thorough factual inquiry, it suggested a bright-line test for general application in products liability cases: “[T]he proper focus in a products liability case is on production and dispersal—not on the location of injury or the specific means by which injury occurred.”<sup>20</sup>

DuPont also appropriately cites *Appalachian Insurance Co. v. Liberty Mutual Insurance Co.*,<sup>21</sup> a seminal case on the issue of the number of occurrences in the liability insurance context. While the case involves employment discrimination claims, the court’s formulation of the cause test has been heavily cited in products liability decisions.

The case arose out of Liberty Mutual’s adoption of certain targeted employment policies with respect to the female employees in its claims department. Several female employees brought a class action in federal district court, and that court found that Liberty’s Mutual’s employment policy discriminated against its female employees on the basis of sex. After additional proceedings in district court, Liberty ultimately settled with the plaintiffs. The relevant policy defined an occurrence as “an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such

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<sup>20</sup> *Id.* at \*3.

<sup>21</sup> 676 F.2d 56 (3d Cir. 1982).

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exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.”<sup>22</sup>

The court recited the general rule, “that an occurrence is determined by the cause or causes of the resulting injury.”<sup>23</sup> The court deemed it necessary to look at whether there was one proximate, uninterrupted, continuing cause which occasioned all of the claimants’ injuries. Ultimately, the court concluded that there was only one occurrence for purposes of policy coverage; that the injuries for which Liberty Mutual was liable all resulted from a common source, its discriminatory employment policies; that the single occurrence was therefore Liberty Mutual’s adoption of its employment policies in 1965; and that Liberty Mutual’s deductible retention was only applicable once. The court was unpersuaded by the fact that the claimants incurred differing injuries of differing degrees over time:

The fact that there were multiple injuries and that they  
were of different magnitudes and that injuries extended

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<sup>22</sup> *Id.* at 59 n.8. Contrary to Stonewall’s argument that DuPont’s out-of-state cases are inapposite because they construe different policy language, the “deemer” clause in *Appalachian* is identical to that in the Stonewall policies. The argument is further unavailing in that Stonewall cites only one case for the proposition that “the Court should look instead to decisions that interpret the deemer provision at issue in this case.” Stonewall’s Opposition to DuPont’s Motion for Entry of Judgment as a Matter of Law, at 12. That case, *Cadet Manufacturing Co. v. American Insurance Co.*, 391 F. Supp. 2d 884 (W.D. Wash. 2005), bears little relevance to a products liability analysis. Two separate sites, or two separate “premises locations,” were exposed to environmental contamination, such that each release of toxic material was determined to be a separate occurrence. Interestingly, the court acknowledged the holding in *Appalachian*, but specifically held that the premises location of the relevant occurrence or occurrences was not an issue before the court in *Cadet*’s case. *Id.* at 894.

<sup>23</sup> 676 F.2d at 61.

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over a period of time does not alter our conclusion that there was a single occurrence. As long as the injuries stem from one proximate cause there is a single occurrence. Indeed, the definition of the term ‘occurrence’ in the Appalachian policy contemplates that one occurrence may have multiple and disparate impacts on individuals and that injuries may extend over a period of time.<sup>24</sup>

A more recent Third Circuit case relied on the cause test as articulated by the *Appalachian* court in the context of the manufacture and sale of a harmful product. The insured in *Liberty Mutual Insurance Co. v. Treesdale, Inc.*<sup>25</sup> manufactured and sold a product containing asbestos for eleven years. Several thousand personal injury claims were filed, mostly by steel workers. Liberty Mutual, which had issued an umbrella excess policy to the insured, sought a declaration that it had no further duty to defend or indemnify the insured once it had paid out \$5 million (the highest limit of liability under any of the umbrella excess policies at issue). Liberty Mutual argued that all of the asbestos claims arose from a single occurrence, and Treesdale, the insured, maintained that each claimant’s exposure to asbestos constituted a separate occurrence.

Applying the reasoning in *Appalachian*, the district court found that the asbestos claimants’ injuries stemmed from a common source, the manufacture and

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<sup>24</sup> *Id.* (citations omitted).

<sup>25</sup> 418 F.3d 330 (3d Cir. 2005).

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sale of the asbestos-containing products.<sup>26</sup> The Circuit Court held that the district court properly applied the *Appalachian* cause of loss test to control its analysis of whether there were multiple occurrences. While Treesdale argued that the manufacture and sale of asbestos-containing products was neither an “exposure” to anything nor a “condition” to which a claimant could be exposed, the court disagreed, noting that Treesdale was improperly focusing on phrases that were favorable to its interpretation to the exclusion of other relevant language.<sup>27</sup>

The court explained that the limits of liability section in the policy clearly referred to the limits on a per occurrence basis and not a per claim basis. By the language of the policy, “a single occurrence [could] clearly result in injuries to multiple persons.”<sup>28</sup> The limits of liability section stated: “For the purpose of determining the limits of the company’s liability ... all personal injury ... arising out of continuous or repeated exposure to substantially the same general conditions ... shall be considered as the result of one and the same occurrence.”<sup>29</sup> The court reasoned that that section “unambiguously addresse[d] the situation where ... many people allege personal injuries in different years arising from one occurrence.”<sup>30</sup> The court concluded that, based on a fair reading of the Limits of Liability provision, “all

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<sup>26</sup> *Id.* at 335.

<sup>27</sup> *Id.* at 336.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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injuries arising from the same source ar[ose] from one occurrence.”<sup>31</sup>

The *Admiral*, *Appalachian*, and *Treesdale* decisions establish the framework for analysis of any liability coverage dispute involving the definition of “occurrence”—whether in the context of toxic waste, employment discrimination, or a hazardous product.

A number of cases outside the Third Circuit support DuPont’s position that the sale of Delrin, a material improperly designed for its intended application, was one occurrence. One group of cases focuses on the manufacture and sale of a defective product,<sup>32</sup> or some other originating moment when a product was either designed unsuitably or placed into the stream of commerce.<sup>33</sup> Another group, more compelling

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<sup>31</sup> *Id.*

<sup>32</sup> See *Champion Int’l Corp. v. Continental Cas. Co.*, 546 F.2d 502 (2d Cir. 1976) (holding that insured’s “continuous and repeated” sale of defective vinyl-covered paneling constituted one occurrence despite existence of 1400 claims by vehicle owners); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 773 (E.D. Pa. 1989), *vacated on other grounds* by 1989 WL 73656 (E.D. Pa. June 30, 1989) (holding that hundreds of personal injury claims against asbestos and welding products manufacturer arose from single occurrence—“the continuing manufacture and sale by plaintiff of the products involved in each set of lawsuits”); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 587 F. Supp. 1515 (D.D.C. 1984) (finding that manufacture and sale of asbestos-containing products was one occurrence, and investigation of precise conditions of thousands of individual claimants’ exposure to asbestos would be an “administrative nightmare”); *Bartholomew v. Ins. Co. of N. Am.*, 502 F. Supp. 246, 251-52 (D.R.I. 1980) (“[T]he source of all [the plaintiffs’] injury was a single event: the sale of a defectively designed and constructed carwash unit. According to the ‘cause theory,’ then, this unitary, uninterrupted cause produced but one occurrence for insurance purposes.”).

<sup>33</sup> See *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1383 (E.D.N.Y. 1988) (reasoning that manufacturer’s delivery of Agent Orange to military—“the conceptual point at which [the manufacturer] set its contaminated herbicides free upon the world to do their damage”—constituted one occurrence); *Union Carbide Corp. v. Travelers Indem. Co.*, 399 F.

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for DuPont regarding Stonewall’s two-cause theory, analyzes product failures in terms of a single vulnerable characteristic and rejects the argument that multiple technical causes can constitute multiple occurrences. In these latter cases, courts have refused to construe policy language to find multiple occurrences simply because several discrete causes for a product’s malfunction may exist and may be responsible for differing levels and types of damage to claimants.

One such case is *Household Manufacturing, Inc. v. Liberty Mutual Insurance Co.*<sup>34</sup> It supports DuPont’s argument that one occurrence—the sale of the unsuitable Delrin product—cannot be analytically separated based on the scientific possibility that more than one discrete factor caused the PB systems to fail. In that case, the plaintiff’s subsidiary manufactured and sold a plastic hot-cold pressure plumbing system (“Qest”) for residential use, which was supplied to plumbing contractors across the country and installed. More than sixty suits were brought against the plaintiff by claimants alleging that the systems failed and caused property damage. Some claimants alleged leaks, while others claimed there was other property damage as a result of the incorporation of the defective systems into their homes. Two consolidated sets of the underlying lawsuits related to the Qest systems were settled.

Importantly, because both sets of cases settled before trial, there were no

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Supp. 12 (W.D. Pa. 1975) (holding that insured’s incorporation of noxious chemical into widely sold resins during manufacturing process was one occurrence, in light of policy language and business risk insured against).

<sup>34</sup> 1987 WL 6611 (N.D. Ill. Feb. 11, 1987), *withdrawn*, 1987 WL 20137 (N.D. Ill. Nov. 16, 1987).

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findings available as to the precise physical reasons for the leaks in the Qest systems. The defendant insurer had not conducted an investigation to determine the specific causes of the alleged failures, or how many claims fell within each causal category. The court deemed it “unlikely that the exact cause of many of the leaks w[ould] ever be ascertained, since the parts ha[d] not been preserved for testing or inspection.”<sup>35</sup>

The court applied the cause test as formulated in *Appalachian* to determine if there was one “proximate, uninterrupted, and continuing cause” which resulted in the damage to the property owners. While the defendant insurer was not arguing that each separate leak or instance of property damage should be treated as a separate occurrence, it did argue that there were an undetermined number of discrete physical reasons for the failures of the plumbing systems’ component parts, each category of which constituted a separate cause and thus a separate occurrence.<sup>36</sup> The plaintiff claimed that the cause of the leaks could “not be thus artificially disaggregated,” and that the underlying circumstance giving rise to the claims for damages was the sale of the defective Qest system (i.e., the sale of the system was a continuous, repeated occurrence).<sup>37</sup>

The court ruled in favor of the plaintiff’s interpretation on several grounds. First, it noted that the act which gave rise to the plaintiff’s liability, and its right to recover under the policies, was the “continuous and repeated sale of a defective

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<sup>35</sup> *Id.* at \*2.

<sup>36</sup> *Id.* at \*4.

<sup>37</sup> *Id.*

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product on a mass basis.”<sup>38</sup> The plaintiff sold its Qest system on a wide scale, and “it was anticipated that any defects in the system would affect a large number of persons in the chain of distribution.”<sup>39</sup> The court thus emphasized that “[t]he artificially narrow interpretation of ‘occurrence’ suggested by defendant would effectively deny plaintiff the product liability coverage it purchased and thus contravene the intent of the parties.”<sup>40</sup> In addition, the court noted that “the use of the plural ‘conditions’ in the policy’s unifying definitional provisions strongly support[ed] the inference that more than one specific physical defect can give rise to a single occurrence.”<sup>41</sup>

The court also pointed to the broad-based nature of the attacks against the Qest system in the underlying litigation to support its finding of one occurrence.<sup>42</sup> The claimants advanced complaints about the system and its components, their design and construction, the choice of materials used, the manner of assembly, and the assembly instructions provided. Even the plaintiffs who did not allege a leak in the system brought claims on the theory that the system “as a whole” was defective. Synthesizing the diverse complaints, the court held: “The underlying claims in this case ar[o]se from ‘continuous or repeated exposure’ to the same conditions since plaintiff made numerous shipments of the Qest system. The ‘cause’ or ‘underlying

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*5.

circumstance’ of the claims [was] therefore unitary: the sale of the allegedly defective Qest system.”<sup>43</sup>

Finally, the court reasoned that the defendant’s multiple occurrence theory could not be realistically applied: “Defendant admits that the actual reasons for the leaks in the settled cases are unknown and could not in any event feasibly be determined, since no findings of fact were made in the underlying litigation and the parts were not preserved for inspection or testing.”<sup>44</sup> The court cited the *Owens-Illinois* case, in which the D.C. district court decided that to stay resolution of the case to determine the precise conditions of exposure of the thousands of individual claimants would involve an “administrative nightmare.”<sup>45</sup> Here, the court had before it “the terms of the policies, the fact that damage occurred, and the fact that plaintiff [could] be held liable for the damages that may have been suffered.”<sup>46</sup> Thus the Qest claims involved in the underlying litigation constituted a single occurrence within the comprehensive general insurance liability policies, requiring the defendant to

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*6. The defendant further argued that, regardless of the total number of causes of the system failures, it was unlikely that any one would give rise to more than the total amount of the applicable self-insured retention. The court found that argument without merit: “Where the *extent* of injury from any or each of several purportedly discrete causes cannot be ascertained, a determination that multiple occurrences exist so as to insulate the insurer from liability beyond the per occurrence limit cannot be justified.” *Id.* at \*7.

<sup>45</sup> *See supra* note 32.

<sup>46</sup> *Household Mfg.*, 1987 WL 6611, at \*6.

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indemnify the plaintiff for all ratable losses it incurred over the stop loss threshold.<sup>47</sup>

Another case in which insurers unsuccessfully attempted to assign multiple occurrences to multiple possible causes of a product's failure is *Associated Indemnity Corp. v. Dow Chemical Co.*<sup>48</sup> In that case Dow produced a defective resin which was used by numerous cooperatives in gas pipelines. When certain gas lines that comprised the Canadian Rural Gas program leaked and had to be replaced, the co-ops brought claims against Dow. Dow did not actually participate in forming the pipe used in the pipelines—the resins were shipped to extruding companies for that purpose. The pipe was then installed by different co-ops, in different soils and weather conditions, by different techniques. Some of the offending leaks were found to have occurred during installation, and some after.

The Province of Alberta ultimately imposed a moratorium on the installation of the piping, and, based on an expert report, developed a program of grants and loans for co-ops who would replace all of the faulty pipes with different pipes. The expert report, which focused on the pipe's quality and serviceability, found that even the best pipe made from the Dow resin was deficient for use in the rural gasification program, as it lacked the "toughness necessary to withstand th[e] operating pressure

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<sup>47</sup> For a case relying on *Household Manufacturing* in the context of the sale of defective washing machine inlet hoses, see *Mark IV Industries, Inc. v. Lumbermens Mutual Casualty Co.*, 2006 WL 1458245, at \*2 (N.Y. Sup. Ct. Apr. 28, 2006) ("A view taken by the *Household Manufacturing* Court has been reiterated and shared by many Courts throughout the nation.").

<sup>48</sup> 814 F. Supp. 613 (E.D. Mich. 1993).

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when additionally subjected to installation stresses and environmental loads.”<sup>49</sup> A series of Canadian lawsuits against Dow ensued, and Dow ultimately settled with the Province of Alberta and the individual co-ops.

In the subsequent insurance litigation, Dow argued that there was only one occurrence in connection with the Alberta pipeline claims: “the manufacture and sale of an intrinsically harmful product,” the Dow Canada N5303 resin.<sup>50</sup> Certain insurers argued that the property damage to each co-op’s pipeline system arose out of a separate occurrence.<sup>51</sup> The primary insurance policy at issue defined occurrence as “an event, including the continuous or repeated exposure to conditions which results, during the policy period, in personal injury or property damage not intended from the

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<sup>49</sup> *Id.* at 616.

<sup>50</sup> *Id.* at 618. Dow admitted that there were problems in the production and delivery stages, such as excessive moisture and inclusion of off-spec material in the compounding process, which all contributed to the defects in some of the pipes. In other words, Dow acknowledged that there were multiple possible causes of the resin’s defectiveness. However, Dow maintained that the discovery and correction of these specific causes of damage did not forestall the need to replace all of the pipe made with its resin product. All of the pipe compounded from the Dow resin had a tendency toward brittle failure, and this characteristic of the product was the global cause of all of the property damage. *Id.*

<sup>51</sup> More specifically, the insurers argued that Dow’s resins were components of an end product that had different properties; that the end product was installed in different systems by different entities, and was subject to different climatic pressures; that some of the pipes leaked while others functioned normally; that not all of the replaced pipe had been damaged; and that the government’s decision to replace the pipe was not based on the resin’s intrinsic harmfulness, but on the fact that the pipe’s projected useful life was not as long as the government desired. The insurers posited that the resins may have increased the potential for brittleness, but that “no property damage occurred in the absence of other causal factors.” *Id.* at 619.

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standpoint of the insured.”<sup>52</sup>

The court recited three general rules for determining the number of occurrences:

(1) The number of occurrences is determined by reference to the cause or causes of the damage rather than by reference to the number of claims or settlements.

(2) All property damage which results from one, proximate, uninterrupted, and continuing cause stems from a single occurrence.

(3) *If the continuous production and sale of an intrinsically harmful product results in similar kinds of property damage, then all such property damage results from a common occurrence.*<sup>53</sup>

Applying these principles, the court reasoned that all of the pipes, even the ones that did not leak, had “an unacceptable propensity to develop leaks after installation and when subjected to continuous internal operating pressure.”<sup>54</sup> The court reasoned as follows:

In the complex industrial world there are very few situations in which there are not multiple causes of property damage. In identifying the causes of property damage for the purpose of determining the number of

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<sup>52</sup> *Id.* at 617.

<sup>53</sup> *Id.* at 621 (emphasis added).

<sup>54</sup> *Id.* at 622.

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occurrences, the causes of the property damage must be determined from the insured's point of view. *The issue is determined by reference only to those 'causes' for which the insured may have shared some responsibility.*<sup>55</sup>

Here, the court held, Dow did not manufacture the actual pipe, nor did it design or install the pipeline systems at issue: claims were brought against Dow because it made, sold, and delivered the resins. The court found that “[t]he possibility that the property damage in this case may have been caused or aggravated by or during the process of extruding, storing, delivering or installing pipe, because of pipeline design or because of environmental conditions [was] totally irrelevant to the issue before the Court.”<sup>56</sup> The court concluded that all of the resin sold by Dow was intrinsically harmful because “there was an unexplained property or characteristic of N5303 such that all pipe extruded from it, by whatever method, was deficient for use in the rural gasification program.”<sup>57</sup>

Finally, the court explained that the purpose of insurance is to insure, and that an insured is entitled to a reasonable interpretation of its policy to minimize the cost

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<sup>55</sup> *Id.* at 622-23 (emphasis added).

<sup>56</sup> *Id.* at 623.

<sup>57</sup> *Id.* Importantly, the court held that the resins were “intrinsically harmful” *for their intended use in the rural gasification program*. The court did not make artificial distinctions between inherently harmful products and those that only become harmful when installed or incorporated in other products. Similarly, the court in *Chemstar, infra*, found a single occurrence even though the lime was not intrinsically hazardous—it only caused damage when applied for indoor uses. Stonewall’s attempt to distinguish DuPont’s cases on the basis that Delrin is not an “intrinsically harmful” product is unpersuasive.

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of coverage litigation.<sup>58</sup> The court reinforced the appropriateness of the cause theory as applied in the context of intrinsically defective products:

In this case, most of the damage was directly attributable to the overarching cause. Furthermore, it would be virtually impossible to sort out the damage, if any, which was solely attributable to other causes for which the insured was responsible. The production of defective resin was the sole, proximate, uninterrupted, and continuing cause of all of the property damage in the case for which Dow Canada could be responsible.<sup>59</sup>

The case of *Chemstar, Inc. v. Liberty Mutual Insurance Co.*<sup>60</sup> involved a product similar to Delrin, in that it was unsuitable only for certain applications. The court applied a similar analysis to that in *Household Manufacturing and Dow*, rejecting the argument that multiple potential causes gave rise to multiple occurrences. The plaintiff insured sued its liability insurers after defending against 28 claims asserted by homeowners when the plaster on their interior walls pitted. All of the plaster used in the affected homes contained Type S lime supplied by the plaintiff's predecessor, GLC. The plaster allegedly pitted because the lime contained excess amounts of magnesium oxide, or periclase, which is an unstable substance that expands when it reacts with water. The lime tainted with high amounts of periclase was used to make interior plaster which was installed in numerous homes. Over time

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 797 F. Supp. 1541 (C.D. Cal. 1992).

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it absorbed moisture from the air, changed form, and in the affected homes, expanded and popped through the smooth plaster finish of the interior walls. The court noted that pitting was not inevitable in all of the homes--only in those where the periclase pellets were large enough and close enough to the surface so that they could expand and burst through.<sup>61</sup>

The court held that the terms of the policies at issue supported the causation rule. All of the relevant policies contained the “continuous or repeated exposure to conditions” language, and the policies themselves defined an occurrence as the underlying cause of the property damage.<sup>62</sup> “Finding the causation rule supported by precedent and the terms of the policies,” the court held that “an ‘occurrence’ for purposes of applying per occurrence limits on liability is the underlying cause of the property damage.”<sup>63</sup>

The court noted that the parties offered numerous theories regarding the underlying cause or causes of the 28 plaster-pitting claims. The plaintiff argued that the sole cause was GLC’s use of the Nevada quarry, where all of the lime with excessive periclase concentrations was manufactured. Some insurers argued on the basis of multiple potential causes, including certain production defects, handling by various wholesalers, installation by various laborers, and exposure to varying

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<sup>61</sup> The court noted that the lime containing periclase was only defective for certain purposes or applications; for example, it was suitable for outdoor use on stucco exteriors.

<sup>62</sup> *Id.* at 1546.

<sup>63</sup> *Id.* at 1546-47.

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atmospheric conditions.<sup>64</sup> The court determined, based on the undisputed facts, that only one of the proffered theories of causation was viable: “GLC’s failure to take sufficient steps to warn the end users that lime with high periclase concentrations should not be used indoors.”<sup>65</sup> Given that the parties agreed that lime containing periclase is not inherently defective for all applications, the court deemed the other suggested causes irrelevant.<sup>66</sup> The court focused on the unitary event of GLC’s sale of the lime with excessive periclase concentrations without a proper warning: “Neither the presence of periclase, nor its hydration following installation, nor the use of the Apex quarry, nor the various production defects, nor the handling of the lime by various wholesalers and laborers, would have caused the homeowners’ property damage if the lime had not been sold for indoor use or had carried the warning ‘for exterior use only.’”<sup>67</sup> Because the policies stated that a single occurrence may consist of continuous or repeated exposure to substantially the same general conditions, all of the plaster-pitting claims arose from “repeated exposure” to one “general condition”—the failure to warn that lime with high periclase concentrations should not be used indoors.

*Household Manufacturing, Dow, and Chemstar* represent the better view—that the number of independent physical causes contributing to a product’s failure is

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<sup>64</sup> *Id.* at 1547.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

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irrelevant for purposes of determining the number of occurrences. This view is simply a logical extension of the cause test, and it comports with manufacturers' reasonable expectations in entering into CGL insurance contracts. As addressed in *Dow*, there are few industrial torts that do not involve multiple causes of property damage. The proper focus for insurance coverage purposes, however, is the underlying cause of the property damage, *from the point of view of the insured*.

\_\_\_\_\_ For the foregoing reasons, I conclude that Stonewall's contention that the damage at each individual house is a separate occurrence must be rejected. I also rule that even if some fittings failed due to "inside-out" degradation and some failed due to "outside-in" mechanical stresses, the damage giving rise to DuPont's Delrin liabilities all arises from one occurrence – Delrin's lack of suitability for use in PB plumbing systems.

Therefore, DuPont's Motion For Summary Judgment on the Number of Occurrences is ***granted***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.  
President Judge

oc: Prothonotary  
cc: Order Distribution  
File